Supreme Court, U.S.
FILED
FEB 17 1993
OFFICE OF THE CLERK

No. 92-833

In The

Supreme Court of the United States

October Term, 1992

KEVIN ALBRIGHT,

Petitioner,

vs.

ROGER OLIVER, individually and in his official capacity as a police detective with the City of Macomb, Illinois, an Illinois Municipal Corporation and THE CITY OF MACOMB, ILLINOIS, an Illinois Municipal Corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S BRIEF IN REPLY

JOHN H. BISBEE*
LAW OFFICES OF JOHN H. BISBEE
437 North Lafayette Street
Macomb, Illinois 61455
(309) 833-1797

Attorney for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REASONS FOR GRANTING THE WRIT:

A. AN OFFICER WHO INITIATES AND PURSUES CRIMINAL CHARGES WITHOUT AN OBJECTIVELY REASONABLE BELIEF IN PROBABLE CAUSE TO SUSPECT THE ACCUSED OF CRIMINAL WRONGDOING IS NOT ENTITLED TO QUALIFIED IMMUNITY..... 1

B. A §1983 ACTION FOR THE INITIATION AND PURSUIT OF AN OBJECTIVELY UNREASONABLE PROSECUTION SHOULD ACCRUE WHEN THE PROSECUTION TERMINATES FAVORABLY TO THE ACCUSED..... 4

C. THE TERMINATION OF AN OBJECTIVELY UNREASONABLE PROSECUTION FAVORABLY TO THE ACCUSED SHOULD BE A PREREQUISITE TO A §1983 ACTION BASED ON SUCH PROSECUTION..... 5

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

Allen v. McCurry, 449 U.S. 90 (1980) 6

Anderson v. Creighton, 483 U.S. 635 (1987) 2

Barker v. Wingo, 407 U.S. 514 (1972) 3

Boyd v. U.S., 116 U.S. 616 (1886) 3

Brady v. Maryland, 373 U.S. 83 (1963) 8

Brinegar v. U.S., 338 U.S. 160 (1949) 7

Brummett v. Camble, 946 F.2d 1178 (5th Cir. 1991) 5

Collins v. Harker Heights, 503 U.S. ___, 117 L.Ed.2d 261 (1992) 1, 2

Delaware State College v. Ricks, 449 U.S. 250 (1980) 4

DeShaney v. Winnebago County, 489 U.S. 189 (1989) 1

Doggett v. U.S., 505 U.S. ___, 120 L.Ed.2d 520 (1992) 4

Franks v. Delaware, 438 U.S. 154 (1977) 2

Haring v. Prosise, 462 U.S. 306 (1983) 8

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 2, 4

Jackson v. Virginia, 443 U.S. 307 (1979) 3, 4

Judice v. Vail, 430 U.S. 327 (1977) 7

King v. Goldsmith, 897 F.2d 885 (7th Cir. 1990) ... 5, 6, 8

Klopfer v. North Carolina, 386 U.S. 213 (1967) 4

Locke v. U.S., 11 U.S. (7 Cranch) 339 (1813) 7

TABLE OF AUTHORITIES – Continued

Page

Malley v. Briggs, 475 U.S. 335 (1986) 2, 4

Mapp v. Ohio, 367 U.S. 643 (1961) 3

Migra v. Warren City School District Board of Education, 465 U.S. 75 (1984) 6

Napue v. Illinois, 360 U.S. 264 (1959) 8

Preiser v. Rodriguez, 411 U.S. 475 (1973) 7

Robinson v. Maruffi, 895 F.2d 649 (10th Cir. 1990) 5

Rose v. Bartle, 871 F.2d 331 (3d Cir. 1989) 5

Singleton v. City of New York, 632 F.2d 185 (2nd Cir. 1980) 5

Strunk v. U.S., 412 U.S. 434 (1973) 3

United Airlines v. Evans, 431 U.S. 553 (1977) 5

U.S. v. Leon, 468 U.S. 897 (1984) 2

U.S. v. MacDonald, 456 U.S. 1 (1982) 4

U.S. v. Marion, 404 U.S. 307 (1971) 4

Wolf v. Colorado, 338 U.S. 25 (1949) 3

Younger v. Harris, 401 U.S. 37 (1971) 7

STATUTES

Ill.Rev.Stat. Ch. 38 §122-1 6

28 U.S.C. §1738 ..... 6, 8

28 U.S.C. §2254 ..... 6, 7

42 U.S.C. §1983 ..... *passim*

MISCELLANEOUS

Restatement (2d) Torts §653 5

REASONS FOR GRANTING THE WRIT

A.

AN OFFICER WHO INITIATES AND PURSUES CRIMINAL CHARGES WITHOUT AN OBJECTIVELY REASONABLE RELIEF IN PROBABLE CAUSE TO SUSPECT THE ACCUSED OF CRIMINAL WRONGDOING IS NOT ENTITLED TO QUALIFIED IMMUNITY.

The Respondents have subtly but significantly altered the issue posed by the Petitioner. Respondents dwell on the "initiation" of criminal charges. Petitioner framed the issue as based upon the "initiation and *pursuit*" of criminal charges. Pet., pg. i. (Emphasis supplied)

Respondents point out that "the absence of probable cause is not any more or less unconstitutional because the officer reasonably or unreasonably perceived it to be present." Respondents' Brief pg. 6. That may or may not be accurate insofar as the accused perceives the effect upon him or her. But, it is certainly inaccurate insofar as the quality of the governmental conduct is concerned and, therefore, whether the officer is entitled to qualified immunity.

This Court has stressed that §1983 provides a "remedy against . . . abuses of state power that violate federal law. . . . " *Collins v. Harker Heights,* 503 U.S. ___, 117 L.Ed.2d 261, 269 (1992). Section 1983 does not provide a "guarantee of certain levels of safety and security" for individuals, even individuals aggrieved by governmental action or inaction. *DeShaney v. Winnebago County,* 489 U.S. 189, 195 (1989). Section 1983 does not impose "federal duties that are analogous to those traditionally imposed by state tort law." *Harker, supra,* 117 Ill.Ed.2d at 275.

The line between "abuses of state power that violate federal law," *Collins v. Harker Heights, supra,* and those that do not in the context of criminal prosecutions is the line of objective reasonableness "in light of the clearly established law and the information the officers possessed." *Anderson v. Creighton,* 483 U.S. 635, 641 (1987); *Harlow v. Fitzgerald,* 457 U.S. 800 (1982); *Malley v. Briggs,* 475 U.S. 335 (1986); *U.S. v. Leon,* 468 U.S. 897 (1984); *Franks v. Delaware,* 438 U.S. 154 (1977). It is the line beyond which a "reasonably well-trained officer . . . would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Malley v. Briggs, supra,* 475 U.S. at 345. It necessarily follows that it is also the line beyond which a "reasonably well-trained officer . . . would have known [that he should not have pursued the prosecution beyond the arrest, warrant, or preliminary hearing stages]." *Id.* Therefore, a reasonably well-trained officer who initiates and pursues a prosecution where he would have known that no probable cause existed to suspect the accused of criminal wrongdoing is not entitled to qualified immunity. *Id.*

It doesn't matter that a cause of action labeled "malicious prosecution" has not been definitively recognized under §1983. Resp. Br. pp. 15-16. The objectively reasonable belief in the existence of probable cause is established as the touchstone gauging whether the initiation of criminal process resulting in search or arrest is constitutionally sanctionable by application of the exclusionary rule or an action for damages under §1983. *U.S. v. Leon, supra; Malley v. Briggs, supra.* After the initiation of criminal process, it is established that "it is possible a magistrate . . . will fail to perform as a magistrate should," and will thus fail to halt the objectively unreasonable institution of criminal process at the warrant, arrest, or detention after charge stages. *Malley v. Briggs,*

supra, 475 U.S. at 345. An objectively unreasonable prosecution pursued beyond the arrest, warrant, and detention after charge stages necessarily subjects an accused to risk of conviction on proof less than beyond a reasonable doubt because it is recognized that "a properly instructed jury may . . . convict when . . . no rational trier of fact could find guilt beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 317 (1979).

Similarly to an accused who suffers "anxiety and concern" protected against by due process after a "presumptively prejudicial delay," *Barker v. Wingo,* 407 U.S. 514, 530 (1972); *Doggett v. U.S.,* 505 U.S. ___, 120 L.Ed.2d 520, 533 (1992) (Thomas, J., dissenting), an accused unreasonably subjected to an objectively unreasonable prosecution suffers presumptive prejudice in the form of the potential "onus of a criminal conviction" secured in violation of due process. *Jackson v. Virginia, supra,* 443 U.S. at 316. Such an accused, therefore, suffers the "emotional stress that *can be presumed* to result in the ordinary person from uncertainties in the prospect of facing public trial . . . . " *Strunk v. U.S.,* 412 U.S. 434, 439 (1973). (Emphasis supplied). He necessarily suffers that "emotional stress" unreasonably and contrary to due process if the "uncertainties in the prospect of facing public trial," *Strunk, supra,* are aggravated by the pursuit of a baseless, objectively unreasonable prosecution.

Thus, a prosecution pursued without an objectively reasonable belief in the existence of probable cause is an "invasion . . . of the sanctity . . . of the privacies of life . . . , of [a person's] . . . right of personal security [and] personal liberty . . . . " *Boyd v. U.S.,* 116 U.S. 616, 635 (1886); *Wolf v. Colorado,* 338 U.S. 25, 28 (1949); *Mapp v. Ohio,* 367 U.S. 643, 657 (1961). Therefore, the pursuit of a prosecution without an objectively

reasonable belief in probable cause infringes clearly established freedoms protected by the Due Process Clause. An officer who pursues such a prosecution is not entitled to qualified immunity. *Harlow v. Fitzgerald, supra; Malley v. Briggs, supra.*

B.

A §1983 ACTION FOR THE INITIATION AND PURSUIT OF AN OBJECTIVELY UNREASONABLE PROSECUTION SHOULD ACCRUE WHEN THE PROSECUTION TERMINATES FAVORABLY TO THE ACCUSED.

Petitioner submits that if this Court were to adopt the rule he has suggested in his Petition, there could be no doubt that the cause of action for initiation and pursuit of an objectively unreasonable prosecution accrues when that prosecution terminates favorably to the accused. The essence of the rule Petitioner urges is that the pursuit of an objectively unreasonable prosecution unreasonably subjects the accused to the risk of conviction on proof less than beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307 (1979). In doing that, it unreasonably subjects the accused to the "anxiety and concern accompanying public accusation," *Doggett v. U.S., supra,* 120 L.Ed.2d at 533 (Thomas, J., dissenting); *Klopfer v. North Carolina,* 386 U.S. 213, 222 (1967); *U.S. v. Marion,* 404 U.S. 307, 320 (1971); *U.S. v. MacDonald,* 456 U.S. 1, 8 (1982).

In every sense of the word, the objectively unreasonable pursuit of a prosecution is a continuing violation under the rule of *Delaware State College v. Ricks,* 449 U.S. 250 (1980). So long as the prosecution pends, the actionable conduct continues, the risk and resulting "anxiety and concern" continue and do not cease until the objectively unreasonable prosecution itself ceases. *Id.* See also

United Airlines v. Evans, 431 U.S. 553, 558 (1977). The circuits are in accord with this position. *Singleton v. City of New York,* 632 F.2d 185 (2nd Cir. 1980); *Rose v. Bartle,* 871 F.2d 331, 348-49 (3rd Cir. 1989); *Robinson v. Maruffi,* 895 F.2d 649, 654-55 (10th Cir. 1990); and *Brummett v. Camble,* 946 F.2d 1178, 1183-84 (5th Cir. 1991). Judge Jones' analysis in *Brummett v. Camble, supra,* 946 F.2d at 1183-84, is persuasive.

C.

THE TERMINATION OF AN OBJECTIVELY UNREASONABLE PROSECUTION FAVORABLY TO THE ACCUSED SHOULD BE A PREREQUISITE TO A §1983 ACTION BASED ON SUCH PROSECUTION.

The proposition that a §1983 cause of action for an objectively unreasonable prosecution does not accrue until the prosecution terminates favorably to the accused raises a question contemplated by the issue posed by the Petitioner on certiorari. That question is whether the termination of the prosecution favorably to an accused is a prerequisite to a §1983 action for the initiation and pursuit of an objectively unreasonable prosecution. It is, of course, respecting the common law tort of malicious prosecution. See Restatement (2d) Torts, §653(b).

Respondents have cited *King v. Goldsmith,* 897 F.2d 885 (7th Cir. 1990), as authority for the proposition that various unconstitutional components of what was a successful criminal prosecution resulting in conviction may be the subject of a §1983 cause of action. Respondents' Brief p. 14. That seems a dubious proposition. And, *King v. Goldsmith, supra,* does not stand for it.

In *King*, the §1983 plaintiff alleged his conviction was procured by fraud. The district court dismissed on the sole basis of the common law rule that conviction precluded a subsequent suit charging false imprisonment or malicious prosecution. *King v. Goldsmith, supra,* 897 F.2d at 886. The Seventh Circuit in *King* reversed and made clear that it was not analyzing the propriety of plaintiff's §1983 action under the principles of *res judicata* or collateral estoppel. *King v. Goldsmith, supra,* 897 F.2d at 886. See also 28 U.S.C. §1738; *Migra v. Warren City School District Board of Education,* 465 U.S. 75 (1984). Rather, it reversed solely on the district court's application of the common law rule to the case.

As Judge Posner implied in *King*, ordinary principles of claim and issue preclusion would render a §1983 suit by a convicted defendant challenging an aspect of his prosecution problematic. See *Migra v. Warren City School District Board of Education, supra; Allen v. McCurry,* 449 U.S. 90 (1980). Principles of claim and issue preclusion would seem to require that before a §1983 plaintiff could bring an action for damages on grounds necessarily implicating the argument that the conviction was the result of an objectively unreasonable belief in the existence of probable cause, he should first be obliged to successfully challenge his conviction under the various post-conviction procedures permitted in most jurisdictions. See for e.g. *Ill.Rev.Stat.* Ch. 38 §122-1 et seq. Failing that, he should be obliged to pursue remedies under the federal habeas corpus statute, 28 U.S.C. §2254.

If he were successful at any one of those stages, he would then be at the point at which a cause of action for the pursuit of an objectively unreasonable prosecution would accrue. If he were unsuccessful in any post-conviction or habeas corpus challenge, a §1983 action for the initiation and pursuit of an objectively unreasonable prosecution would seem barred as his conviction would be presumed to exist on the strength of proof beyond a reasonable doubt, a quantum substantially greater than probable cause. *Brinegar v. U.S., supra,* 338 U.S. at 175; *Locke v. U.S.,* 11 U.S. (7 Cranch) 339, 348 (1813).

Public policy and the interests of federalism and comity as recognized in *Preiser v. Rodriguez,* 411 U.S. 475 (1973), would also apply. They should preclude a §1983 action directly or impliedly challenging a prosecution resulting in conviction on the grounds of an objectively unreasonable belief in the presence of probable cause. This Court in *Preiser v. Rodriquez, supra,* held that a convicted and incarcerated defendant who challenged the fact of his incarceration as being in violation of the Constitution and sought equitable relief was first required to seek redress under federal habeas corpus, 28 U.S.C. §2254. That rule could apply as well to §1983 damage actions brought by an unincarcerated but convicted defendant (who can show the requisite custody) who challenges the prosecution resulting in his conviction as being based upon an objectively unreasonable belief in the existence of probable cause. See *Younger v. Harris,* 401 U.S. 37 (1971) and *Judice v. Vail,* 430 U.S. 327 (1977).

A §1983 action might appear to allege something other than an argument that a prosecution resulting in conviction was based on an objectively unreasonable belief in probable cause. However, a closer analysis will often reveal that an objectively unreasonable belief in the existence of probable cause is the real basis of the claim.

That is illustrated by *King v. Goldsmith, supra* and other cases alleging the withholding of exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), the knowing use of perjured testimony, *Napue v. Illinois*, 360 U.S. 264 (1959), or alleging an illegal search and seizure, *Haring v. Prosise*, 462 U.S. 306 (1983). Oftentimes the essence of arguments raising those issues will be that had exculpatory evidence not been withheld or perjured testimony not been used, there would have been no objectively reasonable belief in probable cause to suspect the accused of criminal wrongdoing. A successful collateral attack against any conviction raising issues the essence of which is an objectively unreasonable belief in probable cause should be a prerequisite to a §1983 action for the pursuit of an objectively unreasonable prosecution.

This approach is not in conflict with this Court's decision in *Haring v. Prosise, supra*. That case held that collateral estoppel and full faith and credit under 28 U.S.C. §1738 did not preclude a defendant who pleaded guilty from bringing a §1983 action challenging an unconstitutional search. However, *Haring* was limited to the circumstances of a guilty plea and the circumstances where the state courts had not afforded a full and fair opportunity to litigate the Fourth Amendment claim.

CONCLUSION

For the reasons stated above and in his Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN H. BISBEE
Law Offices of John H. Bisbee
437 North Lafayette Street
Macomb, Illinois 61455
Telephone: (309) 833-1797